

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAWN NYIKON,

Plaintiff-Appellee,

V

TIMOTHY W. KOSINSKI,

Defendant-Appellant,

v

CONSTANCE HAMMOND,

Appellee.

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UNPUBLISHED

May 29, 2012

No. 306708

Wayne Circuit Court

LC No. 03-323091-DM

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

After a hearing on defendant-father's motion to modify custody, the trial court awarded joint legal custody of his three children to him and the children's maternal grandmother and physical custody to the grandmother, with parenting time for defendant-father and plaintiff-mother. Defendant-father appeals asserting that, as a matter of law, the trial court could not award primary physical custody to the grandmother as she lacked standing, and that the trial court's custody decision on the merits was improper. We affirm because the court has authority to award custody to third-persons even if they are not parties to the case and because the trial court gave proper weight to the presumption favoring natural parent custody and properly concluded that, taken together with the best interest factors, the evidence clearly and convincingly demonstrated that the children's best interests required physical custody with their grandmother.

**I. BACKGROUND**

After a nine year marriage, the parties were divorced in 2004. The judgment of divorce provided that they would have joint legal and physical custody of their three children who are now 12, 11, and 10 years old. Since the divorce, defendant-father Kosinski has lived at his house in River Rouge. Plaintiff-mother Nyikon lived in various places, including for some time, with her mother, appellee Hammond, in Wyandotte. In 2009, plaintiff Nyikon moved to Chicago for

several months after which she returned to Wyandotte and began living in a home that she shares with several other women and at which men and children are not permitted.

Since the divorce, the children have primarily resided at Hammond's home and Kosinski has exercised parenting time to varying degrees. Hammond, not Nyikon, provided the primary care for the children when they were at her home.

When plaintiff moved to Chicago, defendant filed a motion to change custody. The motion remained pending until 2011 when the court conducted a best-interests hearing over a three day period after which it issued a written opinion that accurately stated the applicable law and reviewed the best interest factors. The trial court awarded joint legal custody of the children to Hammond and defendant, and awarded sole physical custody to Hammond with parenting time for both parents. We affirm.

## II. PROCEDURAL ISSUES

Defendant contends that the trial court erred in awarding custody to Hammond because she did not have standing. However, this Court has clearly stated that "[i]f a child custody dispute is pending, the trial court may award custody of the child to others if it is in the child's best interests." *In re Anjoski*, 283 Mich App 41, 62; 770 NW2d 1 (2009). MCL 722.27(1)(a) provides, in part:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .

In *Anjoski*, this Court further stated:

There is no limiting language in the statute that conditions an award "to others" to only those "others having standing," as plaintiff argues. Rather, the statute's sole limitation is that the award be in the child's best interests, after weighing the parental presumption, applicable burdens of proof, and the statutory best interests factors. [283 Mich App at 62-63.]

Defendant also contends that Hammond did not file an action for custody or a motion to intervene. In *Anjoski*, this Court noted that "if a third party lacks standing, he or she cannot become a party to a custody dispute," and "[a] third party without standing cannot initiate that

dispute.” *Id.* at 63.<sup>1</sup> Therefore, if Hammond lacked standing, she was not permitted to file an action for custody or to intervene. See *id.* at 52 n 4, 63.

Defendant also contends that Hammond could not attain a legal right to custody merely because the children resided with her. In *Sirovey v Campbell*, 223 Mich App 59, 69; 565 NW2d 857 (1997), this Court stated:

Third parties do not attain a legal right to custody on the basis of the fact that a child has resided with them. Accordingly, intervening petitioners do not have standing to assert a claim for custody of [the child] by virtue of the facts that they are her grandparents or that she lived with them. [Citation omitted.]

“However, once a custody dispute has been properly initiated, it is within the court’s authority to award custody of the child to a third party pursuant to MCL 722.27(1)(a) if it is appropriate to do so under the particular facts of the case.” *Anjoski*, 283 Mich App at 63. Accordingly, even if Hammond did not have a legal right to custody or standing to bring a custody action, *Sirovey*, 223 Mich App at 69, the trial court was permitted to award custody to Hammond in the custody dispute initiated by defendant. See *Anjoski*, 283 Mich App at 63.

Finally, defendant contends that the trial court was precluded from applying the best interest factors because the action did not arise during a divorce action. In *Sirovey*,<sup>2</sup> this Court stated:

Pursuant to the above statutes and case law, we believe that the appropriate divorce case in which a third party without standing may be awarded custody of a child can best be summarized as follows. When a parent . . . files for divorce, a custody dispute is created by a person with standing to request the circuit court to make a determination of the child’s best interests with respect to custody of the child. . . . [T]he circuit court has jurisdiction under the divorce act to award custody of the child to a third party during the pendency of the divorce proceedings or upon entry of the judgment of divorce, not because the third party has a legal right to the child (standing), but because the court has determined that it is in the child’s best interests that custody be awarded to the third party.

When a parent petitions for a change in custody following the entry of the divorce judgment, again, a custody dispute is created by a person with standing to request the circuit court to make a determination of the child’s best interests with respect to custody of the child. . . . [T]he circuit court has jurisdiction under the divorce act to enter an order modifying the judgment of divorce and award

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<sup>1</sup> The *Anjoski* Court also noted that “a party moving to intervene in litigation . . . must demonstrate that the party has standing to assert his or her claims.” 283 Mich App at 52 n 4.

<sup>2</sup> The Court relied upon an earlier version of the divorce act. *Sirovey*, 223 Mich App at 71, 76, 77.

custody of the child to a third party not because the third party has standing, but because the court has determined that it is in the child's best interests that custody be awarded to the third party. [223 Mich App at 81-82 (citations omitted).]

Thus, the trial court was permitted to award custody to Hammond if it was in the children's best interests even if the custody dispute did not arise during the original divorce action. See *id.*

### III. MERITS

We reject defendant's contention that the trial court abused its discretion and committed clear error in awarding physical custody to Hammond.<sup>3</sup>

This Court has set forth the steps for effectuating a change in custody under the Child Custody Act, MCL 722.21 *et seq.* *Anjoski*, 283 Mich App at 53. "A party seeking a change in custody must first establish proper cause or a change of circumstances by a preponderance of the evidence." *Id.* There is an exception to this rule where a biological parent is seeking to regain custody from an agency or third party. *Frowner v Smith*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (April 26, 2012, Docket No. 305704, slip op at 8). Where a motion for a change in custody is properly before the court, the court must then determine which burden of persuasion applies and conduct an evidentiary hearing. *Anjoski*, 283 Mich App at 53. "[I]f a petition for a change in custody involves a parent and a third party, there is a strong presumption that awarding custody to the parent is in the child's best interests." *Id.* at 54. The burden of proof is on the third party "to rebut the parental presumption by clear and convincing evidence." *Id.* "[T]he parental presumption trumps the presumption of an established custodial environment." *Id.* at 55.

Accordingly, in order to overcome the parental presumption . . . a third party nonparent must "prove[ ] that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person." [*Anjoski*, 283 Mich App at 56 (citation omitted).]

The trial court did not make a finding of "proper cause" or a "change of circumstances" before the evidentiary hearing. *Id.* at 53. However, the existence of such is not disputed by the parties on appeal. Although the trial court did not make such a specific finding, the trial court articulated and applied the correct standard, requiring the third party to show by clear and convincing evidence that custody with the parent was not in the children's best interests. See *id.* at 56. Although this case did not begin as a custody dispute between a parent and a third party,

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<sup>3</sup> "This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. Findings of fact should be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court's discretionary decisions, such as its custody awards, are reviewed for an abuse of discretion." *Anjoski*, 283 Mich App at 49-50 (quotations omitted).

but as a custody dispute between parents, during the course of the evidentiary hearings, it became apparent that the trial court was considering granting custody to Hammond and that Hammond was willing to accept custody. The trial court found an established custodial environment with Hammond. Applying the best interest factors, the trial court then found it would be in the children's best interests to award custody to Hammond.

Defendant argues that Hammond's role as a babysitter could not and did not become an established custodial environment.

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(c).]

"Whether an established custodial environment exists is a question of fact that we must affirm unless the trial court's finding is against the great weight of the evidence." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

The trial court found that Hammond had been "largely responsible" for the children's needs since at least June 2009, that the children look to Hammond for "affection, guidance, and necessities," that the children have looked to Hammond "as the provider of necessities, transportation, assistance and guidance" for an appreciable period of time, and that Hammond has a permanent relationship with the children. Hammond testified that she takes the children to school on Monday, Wednesday, and Friday, that she had the children every day in the year before the hearing, that the oldest child goes to her when he is afraid or sick, that the middle child goes to her when he is afraid, that she purchases most of the children's clothing, that since they have been born the children have stayed at her house at least four days a week, and that on the days that defendant picks the children up between 5:00 p.m. and 7:00 p.m., the children eat dinner at her house. Moreover, defendant provided little testimony that would support a finding of an established custodial environment with him. Accordingly, the trial court's finding of an established custodial environment with Hammond was not "against the great weight of the evidence." *Id.*

Defendant also argues that there was no evidence that awarding custody to defendant would not be in the children's best interests. Defendant, however, does not address or apply the best interest factors in his appellate brief. "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Id.* at 712. We note, however, that the trial court's findings regarding the best interest factors were not "against the great weight of the evidence" and the trial court did not abuse its discretion in awarding custody to Hammond. *Id.* at 705. Specifically, the trial court found that factors (a), (b), (c), (d), and (l) favored Hammond, factors (e), (g), and (j) favored both Hammond and defendant, factor (f) favored both parties and Hammond, and factor (h) did not favor either party or Hammond. With regard to factor (i), the trial court considered the children's preferences, but did not state who the factor favored. Finally, the trial court found that factor (k) did not "significantly affect its decision." The court's findings were based on substantial evidence and the court properly concluded that the existence of an established custodial environment and all the best-interest factors, taken together, clearly

and convincingly demonstrated that physical custody with the children's grandmother was in their best interests.

Finally, defendant contends that the trial court interfered with his fundamental liberty interest in raising his children because it found he was a fit parent. However, the standard, requiring the third party to show by clear and convincing evidence that placement with the third party is in the child's best interest, takes into account the parent's fundamental constitutional liberty interest. See *Heltzel v Heltzel*, 248 Mich App 1, 27; 638 NW2d 123 (2001) ("We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.") Moreover, the "recognized burdens of proof adequately protect [a parent's] fundamental right and liberty interests, particularly in light of the consideration of the child's best interests, safety, and welfare." *Anjoski*, 283 Mich App at 64. The Michigan Supreme Court has further found that the trial court is not required to show that the parent is unfit, stating:

Defendant would have the Court require a demonstration of parental unfitness before allowing the parental presumption to be rebutted where no such demonstration is required by the statute. That would in effect, give unlimited deference to all parenting decisions of parents deemed to be fit. However, "[a] determination that an individual has a fundamental right does not foreclose the State from ever limiting it." Such a determination is not constitutionally mandated. To hold that parental unfitness is a mandatory prerequisite to rebutting the parental presumption would be inconsistent with the [Child Custody Act]'s emphasis on best interests and lack of reference to fitness. [*Hunter v Hunter*, 484 Mich 247, 268 n 40; 771 NW2d 694 (2009) (citation omitted) (first alteration in original).]

Therefore, the trial court properly found that it was not required to find that defendant was unfit in order to award custody to Hammond and that its order did not interfere with defendant's fundamental constitutional liberty interest. See *id.*

Affirmed.

/s/ Pat M. Donofrio  
/s/ Kathleen Jansen  
/s/ Douglas B. Shapiro